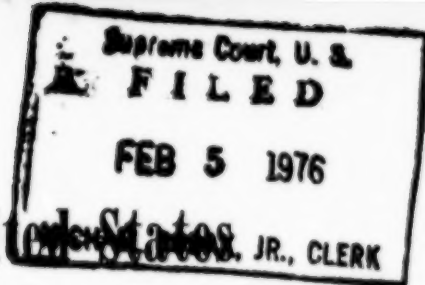


IN THE
Supreme Court of the United States



October Term, 1975

No. 75-666

COFFEE-RICH, INC., a Delaware corporation, and RICH
PRODUCTS CORPORATION, a Delaware corporation,

Appellants,

vs.

JERRY W. FIELDER (appointed as Successor to RICHARD
LYNG), as Director of Agriculture of the State of California;
R. L. VAN BUREN, as Chief of the Bureau of Dairy Service
of the Department of Agriculture of the State of California;
L. H. LOCKHART, as Regional Administrator of the Bureau
of Dairy Service of the Department of Agriculture of the State
of California,

Appellees.

On Appeal From the California Court of Appeal,
Second Appellate District, Division One.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

Appellants herein respectfully petition this Court for an order vacating its order of January 12, 1976, dismissing the within Appeal for lack of jurisdiction and denying certiorari and either noting probable jurisdiction or in the alternative treating the jurisdictional statement as a petition for a writ of certiorari and granting such petition. As grounds for the within petition appellants state as follows:

This appeal presents significant and substantial issues which are also pending in another case arising under California law and presently before this Court.

In *California State Board of Pharmacy et al. v. Shirley Terry et al.* No. 75-336 this Court is presented with an appeal from a Three-Judge District Court in the Northern District of California. In *Terry*, the District Court dealt with a statute restricting advertising in connection with prescription drugs and held (1) that the commercial speech proscribed was subject to protection under the First Amendment to the United States Constitution as made applicable to the States by the Due Process Clause of the Fourteenth Amendment and (2) found that the law was unconstitutionally vague in large part by reason of "the defendants' inconsistent attempts to elucidate the scope of the statute." (395 F.Supp. 64 at 107.)

This Court is now also in the process of dealing with the parameters of the First Amendment right to free speech in a marketing context in the case of *Virginia Citizens Consumer Council Inc. v. State Board of Pharmacy*, 373 F.Supp. 683 (E.D. Va. 1974), *prob. Juris. noted* 420 U.S. 971 (1975), No. 74-895. As with *Terry*, the Court is being called upon to determine whether or not a state statute proscribing the provision of important consumer information through the advertising media is constitutionally infirm as a wrongful deprivation of the First Amendment right of free speech and its companion, the public's "right to know." (373 F.Supp. at 687.)

Coffee-Rich likewise presents the issue of whether a state statute in California which regulates and limits the labeling of food products* is unconstitutionally vague and whether such restrictions have the effect

**Terry* found that the type of commercial speech involved was informational rather than "promotional" since the advertising involved did not have the effect of creating a desire for prescribed medicine but rather afforded the consumer the basis for making

of "chilling" the exercise of First Amendment rights applicable under the Due Process Clause.

At the time of the filing of *Coffee-Rich* and during early proceedings it appeared that First Amendment rights in the commercial context were the subject of very limited protection. Absent the applicability of the First Amendment this Court has consistently refused to consider attacks against statutes on their face on the ground of vagueness. *United States v. National Dairy Prod. Corp.*, 372 U.S. 29, 36 (1963). In recent years the doctrine enunciated in *Valentine v. Chrestensen*, 316 U.S. 52 (1942) and *Breard v. City of Alexandria*, 341 U.S. 622 (1951), both dealing with commercial speech in a promotional context, has been questioned and eroded in decisions bringing within the umbrella of First Amendment protection "commercial" situations earlier thought to be without protection.

In *Terry* the statute was found to be subject to the First Amendment although dealing with advertisements. First Amendment issues presented in *Coffee-Rich* deal strictly with labeling in the context of the present case and are thus of a more *informational* nature than the protected speech in *Terry*.

In *Terry* the defendant State's counsel made inconsistent arguments to the court with respect to the application of the statute, yet according to appellants in *Terry*, the administrator's "interpretation has never altered since the statute was enacted." (*Terry*, *Juris. St.* p. 18.) The inconsistency of counsel's position, alone, was found a sufficient basis to invalidate the

an intelligent price choice between different sellers. *Coffee-Rich* likewise presents the issue in the context of Chapter 1250 on its face of whether consumers shall be given sufficient label information to make intelligent buying decisions as between one product and another.

statute as being unconstitutionally vague. In *Coffee-Rich* not only were counsel for the administrator inconsistent in construing the statute, but the administrator himself was inconsistent in numerous critical points in his interpretation of the law. (*Coffee-Rich* Juris. St. pp. 24-26.) In spite of the more aggravated inconsistencies in *Coffee-Rich*, the act was upheld.

Appellants submit that if the subject of the statutes in *Terry* are within First Amendment protection, then the statutes in *Coffee-Rich* are subject to similar scrutiny. The question of vagueness must be considered to determine whether Chapter 1250 may deter the constitutionally protected and socially desirable conduct of informing consumers. Since *Terry* comes before the Court following the invalidation of state law and *Coffee-Rich* is presented in the context of state laws being upheld (at least in the context of the instant appeal) these two cases should be considered together.

Appellants should not be required by this Court to submit to this unconstitutional law and be subject to the fiat of an administrator who construes the law in a different fashion from day to day guided by counsel who cannot determine what the law means.

Conclusion.

In light of the foregoing, Appellants submit that this Appeal does present substantial federal questions which may be determined by this Court at the present time and need not be left to consideration after the statute has been applied.

Respectfully submitted,

ELLIS ARNALL,

Counsel for Appellants.

Certificate of Counsel.

As counsel for the Appellants, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay.

EDWIN FRESTON,

Counsel for Appellants.